COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 036398-98**

Roland Caron	Employee
Rusco/Regis Steel Co.	Employer
National Union Fire Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, Costigan and Horan)

APPEARANCES
Matthew F. King, Esq., for the employee
Shawn F. Mullen, Esq., for the insurer

CARROLL, J. The employee and the insurer cross-appeal from a decision in which an administrative judge awarded ongoing partial incapacity benefits for a July 6, 1998 industrial injury, based on an average weekly wage computed in accordance with the "prevailing wage" provisions of G. L. c. 149, §§ 26 and 27. We summarily affirm the decision with regard to the insurer's arguments that the judge erred in applying the prevailing wage statute to the employee's average weekly wage.[1] We agree with the employee that the judge used erroneous reasoning in rejecting the employee's claim that § 35B should apply to enhance his average weekly wage after his unsuccessful return to work. We reverse that aspect of the decision. We recommit the case for further findings on whether the employee sustained a "subsequent injury" within the provisions of § 35B, such that the section would apply.

On July 6, 1998, the employee suffered a low back injury while employed as an

[1] We also summarily affirm the decision with regard to both parties' challenges to the judge's assignment of a weekly $250.00 earning capacity. See Mulcahey's Case, 26 Mass. App. Ct. 1 (1988)(court sanctioned adjudicatory expertise of administrative judges on earning capacity issues).

iron worker on the "Big Dig" Central Artery Project. (Dec. 4, 18.) The employee continued to work, with pain, until September 10, 1998. On that day, he experienced an increase in symptoms when he reached for something at work. He left work and did not return until June 1999, when he returned to adjusted work. The insurer paid § 34 incapacity benefits while the employee was out of work. He continued to work modified duty until December 1999. At that time the employee voluntarily left work, to avoid the aggravating effects of the winter weather on his back. (Dec. 5.) He filed no claim for benefits during that winter leave of absence. Upon returning on April 10, 2000, the employee again worked at the modified duty job he had performed in 1999. The employee felt that his back was uncomfortable at that time, but continued working even though his symptoms increased. On June 5, 2000, the employee's symptoms had increased to the point that he could no longer work. He left work and has not worked since that time. (Dec. 5-6, 21.)

At hearing the employee claimed that G. L. c. 152, § 35B, should be applied to enhance his benefits, because he had returned to work following his July 6, 1998 compensable injury for a period that exceeded two months' time. That statute provides, in pertinent part:

> An employee who has been receiving compensation under this chapter and who has returned to work for a period of not less than two months shall, if he is subsequently injured and receives compensation, be paid such compensation at the rate in effect at the time of the subsequent injury whether or not such subsequent injury is determined to be a recurrence of the former injury . . . .

G. L. c. 152, § 35B.

The judge denied the applicability of § 35B to the employee's benefits, because he concluded that the employee had not "returned to work for a period of not less than two months" when he left work on June 5, 2000 due to his injury:

> I find that following his return to work in April of 1999 the Employee did work until he left again in December of 1999. I further find that by his own candid testimony the Employee left work in December of 1999 and "took the winter off". The Employee made no claim for a new or [§ 35B] subsequent injury for the

> period from when he left work in December of 1999 until his return on April 10, 2000.
>
> I find further that when the Employee left work on June 3 [sic], 2000 he had not been back to work for a period of not less than 60 days and therefore the provisions of § 35B are not applicable to his claim.

(Dec. 23-24.) We conclude that the judge's reason for denying the application of § 35B is contrary to law.

Section 35B simply states that an employee, who has had an injury for which c. 152 benefits have been paid, must have "returned to work for a period of not less than two months," in order to qualify for the special treatment the statute accords a "subsequent injury." We do not construe the clause, "*a period* of not less than two months," to require a unitary period of at least two months prior to a subsequent injury. In so concluding, we rely on the original construction of § 35B in Don Francisco's Case, 14 Mass. App. Ct. 456 (1982), in which the Appeals Court stated the durational aspect of the statute as follows:

> We construe the terms, "subsequently injured" and "subsequent injury" to mean a change in the employee's physical or mental condition, see Burns's Case, 218 Mass. at 12; Fitzgibbons's Case, 374 Mass. at 637-638, *which occurs at least two months after his return to work.*

Don Francisco, supra at 461 (emphasis added). The court's interpretation merely places the "subsequent injury" "at least two months" after the employee returns to work. There is no reference to an undivided "period of not less than two months." Moreover, we give the § 35B statutory phrase, "[a]n employee who has been receiving compensation under this chapter, and who has returned to work," its plain meaning; that is, the employee returns to work after a period of incapacity due to the industrial injury. See McDonough's Case, 440 Mass. 603, 608 (2003)(giving § 35C its plain meaning).

Accordingly, we disagree with the judge's interpretation that the two month period for § 35B purposes was that which commenced on April 10, 2000, after the employee had already "returned to work" for six months – June to December 1999. We instead believe that the employee is correct in his assertion that one need only to have spent "at least two

months", (Don Francisco, supra), working after his initial return to work post-injury to satisfy that provision of the statute, which the employee clearly did between April and December 1999. Gaps in employment which result in the two month period being attenuated do not affect the statute's application.

We therefore reverse the judge's denial of § 35B's application to the present case. We recommit the case to the administrative judge for further findings on whether the employee suffered a "subsequent injury" within the meaning of § 35B. See Don Francisco, supra at 460-461, quoting Burns's Case, 218 Mass. 8, 12 (1914)("subsequent injury" interpreted to mean "*change* in any part of the system [that] produces harm or pain . . . ."); Ottani v. Ottani Tree Service, 9 Mass. Workers' Comp. Rep. 633, 639 (1995)("Upon recommittal . . . the judge should make explicit findings regarding the § 35B elements of 'subsequent injury' "). If the judge determines that § 35B applies, he should order benefits in accordance with the rates in effect on the June 5, 2000 date of the "subsequent injury." To the extent that such rates might require the judge to make more definite findings with regard to the actual amounts to be included within the employee's § 1(1) "prevailing wage," the judge should do whatever is necessary to ensure an accurate order of payment.

The case is recommitted.

So ordered.

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Martine Carroll
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Filed: **March 14, 2005**

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Mark D. Horan
Administrative Law Judge